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Italian criminal procedure and rights of defence in the pre-trial stage[1]

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Abstract: The right of defense plays an essential role in the concept of a fair lawsuit, in a non-formalist sense. This right represents not only the aspect of the right to the adversary system, but also, and above all, the guarantee of its genuine implementation. The right to be assisted by an interpreter is seen as a way for the accused to conscientiously participate in the lawsuit though effective understanding of all its aspects. The Italian Constitution recognizes the right of a suspect/accused to be informed of the accusation against him, and of his rights, as soon as possible. The right to legal aid is also guaranteed. There are, in addition, special government provisions for dealing with minors and with regards to their educational interests, especially during the judgment phase.

Key-words: Right of defense – Pre-procedural stage – Italian procedural law.

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The italian segment of the project, funded by the European Commission (*Grant Agreement No.* JLS/2006/AGIS/034), was directed by Prof. A. di Martino, and the Author, member of the appointed team of researchers, was just in charge of drafting the report about legislative and jurisprudential situation of the right of defence in the Italian criminal procedure, with a closer look at the pre-trial stage. The views expressed in this publication cannot be taken to represent the official opinion of the European Community.

1 RIGHT TO UNDERSTAND THE LANGUAGE OF THE PROCEEDINGS

In the Italian legal system, the right to be assisted by an interpreter is seen as a way for the accused to consciously take part in the trial through the effective understanding of all aspects of the proceeding.

In fact, the Italian Constitution provides that the right to get an interpreter for the accused who does not understand or does not speak the language used in the proceeding (Art. 111, Par. 3 as reformed by Const. Law No. 2/1999; Art. 6, Par. 1, lett. *e)* ECHR and 14 Par. 3, lett. *f)* ICCPR, also includes the "free" nature of this right. The presence of an interpreter is seen by the judicial system as one of the fundamental aspects of the right to defence – recognised by Art. 24 Const., of both the citizen and the foreigner as per Art. 2 Const.).

On the ordinary law level, Art. 143 recognizes the right of the accused who does not speak Italian to the *free* assistance of an interpreter in order to be able to understand the charges formulated against him and to follow the conclusion of the proceedings which he attends.

The Constitutional Court (Judg. No. 10/1993) has affirmed that Art. 143, Par.1, thanks to its constitutional source, must be interpreted as a general clause of ample application, destined to expand and specify itself on an ad hoc basis – according to the circumstances of the accused and the type of aide required. Thus, the right to the assistance of an interpreter, as interpreted by Constitutional Court, applies also to the pre-trial stage and includes the translation of the documents containing and describing (or just formulating) the accusation (in execution and pursuance of ECourtHR, Judg. 19.12.1989, Kamasinski vs. Austria).

The protection of rights of the non-Italian-speaking accused has received further meaningful recognition in the works of the Court of Cassation that recently decided that the notice of conclusion of the investigations (Art. 415-*bis* CPP) and the committal for trial must be translated into the language of the foreign accused, otherwise it is void. Nevertheless, if it is shown that the accused understood the content of the committal for trial (argued from the fact that he asked for the special procedure of "summary trial"), the nullity normally following the incorrect translation is avoided (see Cass. s.u., 28.11.2006, C.A. ed altri).

Furthermore, the Court has established that the warrant of preventive detention towards a foreigner who does not speak Italian must be translated into a language which he understands, otherwise the act is invalid. Absolute presupposition of the obligation of translation is the verification of the knowledge of the Italian language, which the jurisdictional organ has to carry out, even where the party has neglected to declare its inability to communicate in the language used in the proceeding (Cass. s.u. 24.9.2003, Zalagaitis). Recently, the Court of Cassation declared that the "presentation" of the detainee conducted by the prosecutor before the Tribunal for the confirmation hearing and the contextual start of the special speedy trial ex Art. 449 and 558 CPP, is not "valid" if the individual does not speak Italian and an interpreter has not been appointed ex Art. 143. The Supreme Court observed that in order for the presence of the accused in the procedure (or proceedings) to be real it must be conscious, especially in the phases characterized by the principle of orality. In other words, the person appearing before the judge must be given an opportunity to listen, and to be heard. Subsequently, it is up to the prosecutor who intends to file the charges to assure that the presence of the accused is "real" through the assistance of an interpreter (Cass. V, 12.3.2007, Touama).

Moving in the direction of enforcing the conscious attendance of the accused in the trial, seen as an irrenounceable portion of the right of defence, one has to remember: the judgment of unconstitutionality pertaining to Art. 119 CPP (Const. Court., Judg. 341/1999), according to which also the deaf, mute, or deaf-mute accused, independently from the fact that he is or is not able to read or write, has the right to be freely assisted by an interpreter, preferably selected among the people accustomed to dealing with this individual. The purpose of this is to ensure that the accused understands the nature of the accusation(s) made against him and that he is able to follow the proceedings which he attends; and the recent judgement 254/2007 that has declared Art. 102 d.p.r., No. 115/2002 unconstitutional, in the part in which this provision does not provide, the foreigner who does not speak Italian and who was accorded free legal assistance, the power to name a personal interpreter. The same judgement invites the Parliament to pass a new legislation on this matter.

Unfortunately, the Code (see Art. 144 ff.) stipulates only that the interpreters/translators must have a general ability to deal with public offices (minors under 18 years of age, or individuals with mental conditions, are thus excluded) and cannot have any particular private interest in the proceedings. The proof of possessing due qualifications to become a translator is, therefore, not required.

Despite the fact that the interpreter acts as an assistant to the defence lawyer, he is not appointed by the defendant, but by the judge.

Finally, despite the Vienna Convention on Consular Relations 1963 (VCCR) and the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union [COM(2004) 328 final] stating that every suspect, arrestee (or detainee), or apprehended, can profit, on

multiple levels, of the consular assistance of his own country of origin, the Italian Code of Criminal Procedure does not have any rule of this kind. It also lacks a provision on LA in the foreign language.

2 RIGHT TO HAVE LEGAL ASSISTANCE

Concerning, specifically, the right to have legal assistance in Italy, some preliminary remarks are appropriate. There is no doubt that the present Italian Code of Criminal procedure reproduces a model of adversarial system which, with the reform of Art. 111 Const. operated by the Constitutional Law no. 2/1999, has today a translation more faithful and effective than that offered by the Code Vassalli, itself, in its 1988 original version.

The golden rule of the "adversarial system", chosen as the principal source of judicial truth within a "fair" trial and enshrined in Par. 2, 4 and 5 of Art. 111 Const., imposes that a position of substantial parity is granted to the parties of the proceeding.

If it is true that the (equality) between the parties alone is unable to guarantee the "right to confrontation", it is nevertheless impossible that the latter principle finds full realization whereas the parties do not enjoy equal rights.

The concept of "fair" trial, in a non-formalistic sense, assigns a fundamental role to the right of defence, representing not only an aspect of the right to confrontation but, also and above all, a guarantee of its genuine implementation.

In fact, even before 1999, Art. 24, Par. 2 of the Const. proclaimed the inviolability of the "right of defence" at every stage of the proceedings. Nevertheless, the vagueness of this formula posed a risk of allowing restrictive interpretations, which were possibly contrary to the Constitution.

To avert this result, it was necessary to define the contours of the concept of "defence" elevated to the level of inviolable right. Numerous sentences of the Constitutional Court, joining the right of defence with other constitutional principles concerning the criminal proceeding, have recognized it as a fundamental rampart for the correct accomplishment of the jurisdictional function (see, for example, Const. Court no. 59/1959 and 149/1969). Further, a contribution to that result has been given by the "new" Art. 111, Par. 3 Const., which (expressly listing some important facets of the right of defence) has delineated the essential component of the so called "contradictory in subjective sense", that is, the right of the accused to participate in the trial on a basis of dialectical parity with the prosecutor.

Regarding the constitutional level of the right of defence in the Italian system, it is worth mentioning that Art. 24, Par. 2 Const., unlike the clauses of Art. 6, Par. 3, lett. c) ECHR and Art. 14, Par. 3, lett. d) ICCPR, does not separate the concept of "legal defence" from "self-defence" and, therefore, it seems to exclude the possibility for the accused to abdicate the assistance of a counsel, including where he has been appointed by the court or prosecutor.

Demonstrating a more drastic attitude than the European Court (see Judg. 9.4.1983 Pakelli vs. Austria), the Constitutional Court (Judg. no. 125/1979 and Ord. no. 188/1980) pronounced on the topic during the terrorist emergency in Italy in the seventies, when many accused refused the counsel appointed by law. The Constitutional Court ruled the nature of the right to have a legal defence was inalienable. The Court was of the view that the right to the assistance of a counsel is "*predestined to protect goods and fundamental values of the human being, which are discussed and decided during the proceeding*", the accused "*is not able forgoing the inviolable rights of which he is the owner*". "*A fortiori*" this is true – the Court subsequently held (Ord. 421/1997) – relative to

the "*Code of Criminal Procedure in force, inspired to the principles of the adversarial system*", since "*provisions assuring legal defence*" are "*functional to the realization of a fair trial, guaranteeing the effectiveness of a more balanced contradictory and a more substantial parity of the weapons between prosecution and defence*".

This formulation is reasserted in Art. 97, Par. 1 and 369-*bis* Par. 1 and 2 CPP. Nevertheless, this issue remains controversial and the question still remains as to whether this kind of normative order suggests an intent more "*authoritarian*" than "*promotional*" (Chiavario, Vassalli).

The notice of the right to have legal assistance must be given at the moment of the first act of investigation at which the counsel has the right to be present (Art. 369-*bis*, Par. 1 CPP); if there is no action of this nature, the accused is informed of the right to have a counsel at the end of investigations (Art. 415-*bis* CPP). See: Cass. III, 16.12.2003, Altieri; Cass. IV, 4.12.2003, Bonardi.

The notification of the right to LA must always be written, as per Art. 369-*bis*, Par. 2 CPP (see: Cass. V, 4.7.2003, De Gennaro).

It is interesting to note that, following the coming into effect of Bill no. 397/2000, which pertains to defensive investigations, the defence counsel has an increasingly central role. His nomination can also be made in advance; that is, before the beginning of any investigation and "in the eventuality that a criminal procedure would be initiated" (Art. 391-*nonies* CPP).

The Constitution, coherent with the inviolability of the right of defence, guarantees to the accused who cannot afford the expense of a criminal proceeding "*the financial means to act and to defend themselves before every jurisdiction*" (Art. 24, Par. 3). Based on this precept, an analytical discipline of the legal defence

remunerated by the State is entirely contained in d.p.r. no. 115/ 2002 on the expenses of justice.

In extreme synthesis, it is now possible to affirm that free legal aid is granted to those persons -accused or victim whose annual incomes are equal to or lower than 9.723,84 Euros: see Art. 76 d.p.r. no. 115/2002.

One can ask to be admitted to LA at any stage of the proceedings: see Art. 78 d.p.r. no. 115/2002. The application for the admission to free LA is submitted by the defendant or by his counsel to the judge's office before which the proceeding is pending. If the Court of Cassation proceeds, the application is submitted to the judge's office which had pronounced the appeals judgment (see Art. 93 d.p.r. no. 115/2002).

To be admissible, the application must contain a substitutive declaration of certification by the defendant that attests the subsistence and the financial status required for admission to free LA, (see Art. 79 d.p.r. no. 115/2002). The competent judge decides on the application, which will be rejected if there are well-grounded reasons to believe the defendant does not meet the conditions set out in Art. 76 and 92 d.p.r. no. 115/2002. Aspects to be considered are the applicant's way of life, his personal and family conditions, and the economic activities in which he is involved. In order to assist in his determination prior to his decision on the application, the judge can remit the application and the substitutive declaration to the tax police for the necessary verifications (see Art. 93 d.p.r. no. 115/2002).

The defendant may request authorisation to appeal a Decision by the competent judge, rejecting the application, from the president of the Court or to the president of the Court of Appeals to which the judge who pronounced the decree of rejection belongs (see Art. 99 d.p.r. no. 115/2002).

Otherwise, pursuant to Art. 6, Par. 3, lett. c) ECHR and in accordance with the dictum of the European Court (Judg 25.4.1983, Pakelli vs. Germany), the indigent accused who does not want to exercise his right to self-defence, has the right to the free assistance of a counsel *ex officio* where interests of justice so require it. Art. 80 d.p.r. no. 115/2002 further provides that suspects who receive free legal aid may choose their own counsel from an *ad hoc* list.

Under Art. 81 d.p.r. no. 115/2002 the list of the lawyers available for State-funded legal aid is formed by lawyers who request to be placed on that list. In order to be placed on the list, these lawyers are required to have specific professional experience; they have not suffered disciplinary sanctions heavier than a warning in the five years prior to their request to placed on the list; and they must have been enrolled to the roll for at least two years.

Finally, in order for there to be a "real" legal defence, as advocated by the first judgment of the European Court concerning the Italian system (Judg. 13.5.1980, Artico vs. Italy), the party admitted to the free LA can also use the aid of an expert witness and an authorized private investigator, whose fees will therefore be paid by the State (Art. 101-102 d.p.r. no. 115/2002). In relation to the right of the foreigner granted legal aid, who is not sufficiently competent in the Italian language, to name a personal interpreter the Const. Court., Judg. 254/2007 may be referred to on this matter.

During the pre-trial stage, following notice that the investigation has ended, (Art. 415-*bis* CPP), the defendant may request a further interview with the prosecutor, produce evidence collected by his counsel, or request the prosecutor to carry on further investigations. Partial discovery is provided for in relation to guaranteed acts (such as "incidente probatorio", i.e., anticipated acquisition of proof) or when there is a restriction on one's freedom.

The right to examine and receive copies of documents commences only at the end of investigation and before the formal accusation (Art. 415-*bis* CPP).

Art. 121 CPP provides that at each stage of the proceedings the defendant and his counsel can submit briefs and requests to the judge.

The right of defence is protected by the Constitution and confidentiality, which is a fundamental characteristic of the legal profession, would not find full realization if the relationship between the counsel and his client could be object to "invasive" and indiscriminate investigations by a judicial authority. Besides, the inviolability of one's own home, guaranteed by Art. 14 Const., and the liberty and the secrecy of the correspondence under Art. 15 Const., surely includes the site where the counsel practices his profession. In addition to all these inviolable principles, there are the so-called "guarantees of liberty of the counsel", i.e. measures that protect the spatial and functional sphere of the defence's activity from indiscriminate investigations by the judicial power.

In addition to the above mentioned restrictive measures, there are also provisions governing the privacy of communications between the accused and his counsel. Inspections and searches in the office of the counsel are allowed only when the counsel is also suspected in the proceedings or in order to search traces or things relating to the crime or persons linked to the crime (Art. 103, Par. 1 CPP). On this subject, the Cass. S.u. have specified that the prohibition of search and seizure in the offices of the counsel is not limited to where such acts are ordered by the judicial authority presiding over the proceedings against the accused, but applies where such activity is practiced in a different proceeding (see Cass. S.u. 27.10.1992, Genna; Cass. S.u. 12.11.1993, Grollino). Without doubt, this double intervention has contributed

to strengthening the guardianship of the relationship between defender and his client, which must be protected from external intrusions. In the aftermath of these judgements, nevertheless, there were some jurisprudential withdrawals (see Cass. 5.4.1995, Scialpi; Cass. 20.9.2006, n. 31177).

The inspection and search are made personally by the judge or prosecutor during the investigation (Art. 103, Par. 4 CPP). Moreover, the local BA must be informed in advance so that its president can participate in the operations (Art. 103, Par. 3 CPP). Seizure of correspondence between the suspect and the CD is allowed only when this correspondence is likely to be *corpus delicti* (corpo del reato) (see Art. 103, Par. 6 CPP). The tapping of telephone calls between the suspect and CD, however, is always forbidden (see Art. 103, Par. 5 CPP).

3 RIGHT TO BE INFORMED OF CHARGES

In Italy, Art. 111, Par. 3 of the Constitution – in line with Art. 6, Par. 3, lett. a) ECHR and Art. 14, Par. 3, lett. a) ICCPR – recognizes the right of the suspect/defendant to be informed of the charges against him and of his rights as soon as possible.

According to the law, the information on charges and rights is given to the suspect before a guaranteed act (e.g. before the inspection: see Art. 369 and 369-*bis* CPP) or at the same time of the activity (e.g. at the moment of the arrest and during the interrogation by the prosecutor: see Art. 386 and 388 CPP).

At their first appearance before the judicial officers, the police or the prosecutor must officially inform the suspects of their position in the proceedings; however, the right to know to be a suspect has a different content with regard to the questioning by the police and the interrogation before the prosecutor: only in the

latter case must the judicial officer inform him of the fact for which the person is involved in the proceeding, while in the former, the right provided by the Code only involves the juridical qualification of the charge, and not the fact (see Art. 65 and 350 CPP).

Any violation of the provisions concerning the two essential functions of the counsel for the defence (i.e. assistance and representation) is included in the category of the general nullities (see Art. 178, *letter* c). This provision also operates with regard to the right to be informed of charges.

The nullity of the "information of guarantee" can cause the nullity of the act which it refers to (Cass. VI, 31.10.1996, Testolin; Cass. 16.11.1995, Pagano). Since in the pre-trial stage the charges can be amended without limitation, when this happens, it is not necessary to give a new "information of guarantee". This is because the suspect who has already been informed of the fact that he is under investigation, is considered to be able to exercise his right of defence, even when new allegations emerge, different from those specified in the first information (Cass. VI, 21.2.1995, Iuzzolini).

According to Art. 386, Par. 2 CPP, the judicial police officers must immediately inform the counsel of choice or the *ex officio* counsel of the arrest: however, the violation of this duty (and consequent lack of information for the counsel) does not give rise to any nullity, as no norm makes provision for such. Moreover, as the Court of Cassation holds (Cass. VI, 14.1.2000, Sljivic, CP 2001, 2402), such an omission cannot be brought back to the provision of Art. 178, lett. c) CPP, since the duty to inform the counsel does not directly affect the assistance of the accused and, therefore, does not engrave on his right of defence, to which exercise is aimed the following interrogation by the competent judge. Only a judgment of a Tribunal of first instance has considered the violation of Art. 386, Par. 2 CPP to be a breach of the right of defence, arguing that the duty of communication aims

at guaranteeing the interview with the counsel provided by Art. 104, Par. 2 CPP (P. Ravenna, 24.8.1990, Santi).

An arrested or apprehended person (or one who is under an emergency detention measure at the initiative of the criminal police) may be questioned immediately by the public prosecutor, who must inform the person of the offences allegedly committed by him (Art. 388 CPP); afterwards, the suspect is questioned by the judge who has been requested to confirm the measure, during the confirmation hearing, which must be held, at the latest, within 96 hours from the beginning of the detention measure (Art. 391 CPP). Suspects held on remand custody need to be questioned by the judge within –respectively– five or ten days from the imposition of the detention measure, depending on whether pre-trial detention or other measures are involved (Art. 294 CPP). If a judge does not endorse the validity of the arrest during a specific "arrest validation" hearing within 96 hours from the arrest, the arrested person must immediately be released (Art. 391, Par. 7 CPP).

Even when the judge authorises the detention of the suspect pending the trial, if he does not interrogate the suspect within five days of the beginning of his detention, the suspect must immediately be released (Art. 294 and 303 CPP).

In the Italian system, proceedings *in absentia* are admissible.

International sources and the Italian Constitution (Art. 6, Par. 1 and 3, lett. c) d) and e) ECHR; 14 Par. 3, lett. d) PIDPC and 24 Par. 2 Const.) grant the accused the "right to be present" to "his" trial, but they do not exclude that the accused's conscious and voluntary choice of not being present at his trial give rise to a declaration of *absentia*.

In particular, in the Italian criminal procedure, a distinction is drawn between two separate situations: the default, when the accused has properly been advised or summoned, but he freely

decides not to attend the hearing; the absence, consisting in the voluntary absence of the accused, when he expressly asks that the hearing take place.

In both cases, the accused is represented by his counsel. Unlike the defaulter, the absent defendant is not granted the right to receive the notification of the final decision.

To safeguard the rights of an accused who has not deliberately decided not to participate in his trial, the application of the default's rules depends on the judge's duty to check the effectiveness of the summons and to control the existence of the factual conditions for issuing the decision (*ordinanza*) to open the trial *in absentia*.

Indeed, in order to declare as defaulter an accused who is not present, it is necessary to verify that his summons and the relative notice are valid: it is thus necessary to ensure that it is neither certain nor probable that, except in cases of notification by delivery of the copy to the counsel ex Art. 159, 161, Par. 4 and 169 CPP, the defendant has no knowledge of the hearing's notice due to his fault; that the absence of the accused is not caused by his impossibility to be present due to inevitable accident, *vis maior* or lawful impediment, neither it seems to be probable that it is caused by absolute impossibility to be present due to inevitable accident or *vis maior*; that the accused has not asked or allowed for the hearing to take place in his absence; or that, in case he is detained, he has refused to attend it.

Default and absence's rules are applied to the pre-trial hearing and to the trial (see Art. 420 – quarter, 420-*quinquies* and 484 CPP).

The main point is that, if the right to be present has been violated, the defendant who has been judged *in absentia* can unconditionally be judged again after having been examined (see, recently, Great Chamber, 1.3.2006, Sejdovic vs. Italy).

The possibility to reopen the case for the accused judged in absentia (Art. 175 CPP) stems from the European Court's judgment regarding the pre-existing rule that did not guarantee enough means to protect *ex post* a defendant who had been declared absent (sent. 10.11.2004, Sejdovic vs. Italy). Today, Art. 175 CPP grants the restitution in time to appeal to the accused judged *in absentia*, except when he is aware of the existence of proceedings against himself and, nevertheless, voluntarily decides to not be present.

Yet this new version of Art. 175 CPP does not entirely shelter Italy from other censures by the European Court: on one hand, because the accused restored in time is bereft of a degree of judgment, as the proceeding does not start again *ab initio*; on the other hand, because the first judgments by the Court of Cassation on this matter have greatly restricted the right to restitution in time, restoring presumptions of knowledge and duties of care towards the defendant (see f.i. Cass. I, 21.4.2006, B.R.; Cass. II, 10.3.2006, C.; Cass. s.u., 28.4.2006, D.P.).

The *nemo tenetur se detegere* principle is expressly stated by Art. 14, Par. 3, lett. g) ICCPR ("not to be compelled to testify against himself or to confess guilt"); on the contrary, it is not expressly contemplated either by ECHR or by the Italian Constitution. Nevertheless, the European Court has drawn such a guarantee from the notion of "fair trial" (Judg. 8.2.1996, John Murray vs. UK; Judg. 25.2.1993, Funke vs. France), while the Italian system deduces it from Art. 24 Const.

Two essential profiles of this principle are the right to remain silent and the right against self-incrimination.

In the Code, these two rights are granted by Art. 64, which provides for the right not to answer any question during the interrogation of the accused; by Art. 198, which grants the same right to the witness when he is questioned about facts that could

be relevant for his own criminal responsibility and, in form of anticipated protection, by Art. 63, providing that, if a person who is questioned as a witness gives self incriminating statements, the prosecutor or the police must stop the interrogation and warn him that, as a consequence of the statements given, an investigation may begin against them. The person must also be notified that they have the right to appoint counsel. Any statement given prior to that moment cannot be used against them, although it may be used against other persons (Art. 63, Par. 1). Where the police or the prosecutor interrogate the suspects without informing them of their position in the proceedings, their statements cannot be used against anyone in any criminal proceeding (Art. 63, Par. 2).

The *ne bis in idem* principle permeates the whole Italian criminal procedure and finds its centre in the prohibition to reiterate the proceedings and the judgments on an identical *res iudicanda*. When an accused has been convicted or acquitted in a definitive judgment, Art. 649 CPP excludes that he can be prosecuted again for the same fact. This provision also operates when the "same fact" is otherwise considered "for the charge, for the degree or for the circumstances".

Art. 335, Par. 3 CPP grants the counsel for the defence the right to know whether the person he is assisting is under investigation.

The same provision allows the prosecutor to not inform the defendant or his counsel when there are investigations about some serious crimes; it is possible to avoid the information even for other crimes, when the prosecutor puts the investigations under seal, but for a period no longer than three months (Art. 335-*bis* CPP).

Ex Art. 60 CPP, it is possible to file a charge by committal for trial or by one of the special proceedings regulated in the VI part of the Code (like "application of punishment at the request of the parties", "summary trial", "proceeding by penal decree", etc.).

The investigations should last up to six months (up to 18 months, if the judge authorizes additional investigations): any investigation performed after this period cannot be used in the proceeding. There is no deadline for the formal accusation.

The charge must always be written, except for a special speedy trial ("giudizio direttissimo"), which is only admissible against defendants who have been arrested during the commission of the crime. Only when the acts peremptorily settled by law in Art. 60 CPP are completed has the prosecutor exercised the power of charge: it is only at this moment that the person who was under investigation acquires the *status* of "defendant" (Cass. V, 29.4.1994, Giovannetti; Cass. II, 7.9.1994, Tafuro).

4 POLICE AND/OR MAGISTRATES' INVESTIGATIONS

Regarding the interrogation of the suspect, the Italian criminal procedure ensures the following rights of defence:

– right of the CD to be notified in advance (Art. 350; 364, Par. 3 CPP);

– right to LA (questioning of the suspect cannot be conducted by a police officer in the absence of a lawyer: see Art. 350, Par. 3 CPP; otherwise, although it is mandatory for the prosecutor to give notice to the suspect's lawyer, the presence of the lawyer at the interrogation is not mandatory);

– right to be informed of the charge (see Art. 65 and 350 CPP);

– right to not answer any question not pertaining to self-identification (see Art. 64, Par. 2, Letter b CPP). The right to remain silent may be exercised partially or totally by the suspect: see Cass. 9.12.1996, Federici; Cass. 9.7.1993, Bernardelli).

With regard to search procedures, the Code ensures:

– the right of the counsel to be present but not to be notified in advance (Art. 365 CPP);

– the right to examine the results of search and seizure procedures (Art. 366 CPP) and the right to review the search acts (Art. 324 CPP "istanza di riesame").

During the pre-trial stage, the suspect and his counsel have the right to conduce investigations (see Art. 391-*bis*/391-*decies* CPP, introduced by the already mentioned Bill no 397/2000) and the right to attend those acts which get probative value in the trial; i.e. unrepeatable technical investigations on persons, places, or things subjected to alteration and requiring the presence of a technical expert (Art. 360 CPP); or, in the case of "incidente probatorio" (Art. 392 CPP), in which the evidence, for reasons of emergency, is acquired according to the same rules and guarantees of the trial stage.

When a suspect is provisionally arrested, he has the right to be informed of the charge (see Art. 388, 391 CPP and above under III); the right to LA (see Art. 104 and 386 CPP) and the right to be heard by a judge (see Art. 391 CPP). *Versus* the order that endorses the arrest, the arrested may appeal to the Court of Cassation (Art. 391, Par. 4 CPP).

As explained above, there is a formal closing of investigations. The counsel must be informed of the closure of investigations and has the right to consult and to get copy of the "prosecutor's dossier". The CD also has the right to submit to the prosecutor briefs and results of the investigation. The accused has the right to ask a further interview with the prosecutor (Art. 415-*bis* CPP).

5 VULNERABLE PERSONS

In the Italian system, there are special provisions governing the procedure for dealing with minors and with respect to their

educational interests, in particular at the trial phase (d.p.r. no. 448/1988). The right to LA must be particularly noted, as provided for under Art. 11 and 12 d.p.r. no 448/1988. These last two provisions guarantee minors, at every stage of the proceedings (aside from their counsel who, when must be appointed *ex officio*, is selected from a list of professionals endowed with specific preparation in juvenile law predisposed by the Bar Associations) the assistance of their parents. The juveniles' parents may attend all stages of the proceedings in which the minor's presence is requested, for the purpose of psychological support.

In addition to the minor, other categories of vulnerable persons, at the time of the commission of the offence, for instance those suffering from a physical or mental disability such as deafness or muteness, may be afforded various forms of assistance during trial. Deaf or mute individuals may be afforded special interpreting assistance, such as the presentation of questions in writing (see above, under I, and Art. 199 CPP). With regard to individuals suffering from a physical or mental incapacity rendering them unable to consciously partake in the trial, criminal proceedings may be suspended (possibly even at the investigation stage) and a special guardian appointed, although decisions to prosecute may still be taken (see Art. 70-73 CPP). The Constitutional Court in judgment no. 39/2004, specified that this discipline is not only applicable when the conscious attendance of the subject is prevented by an illness clinically definable as psychiatric, but in every case in which the individual suffers from an infirmity affecting or undermining his mental capacity (such as conscience, thought, perception, and expression).

Finally, specific mention must be made of the special provisions on the preventative detention of pregnant women, mothers, or sick individuals as categories of vulnerable persons (Art. 275 CPP).

Characteristics, such as nationality or race, shall not impact the trial conducted by a judicial authority. However, there are no recent or specific studies on this subject. At the most, it is possible to observe that the foreign accused is rarely granted a special trial and often they are subject to the full penalty that has been imposed on them, without being able to accede to any benefits that may affect the penalty, due to their status.